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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION, UAW-AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 393 F. 2d 49. The Board's decision and order (Pet. App. 14a-38a) are reported at 145 NLRB 1097.

JURISDICTION

The Board's decision and order dismissed an unfair labor practice complaint which had issued upon petitioners' charges. On March 5, 1968, the court of ap-

peals filed its opinion upholding the dismissal, and, on the same day, it entered a judgment (App. *infra*, pp. 15-16), denying the petition for review in accordance with its opinion. On April 16, 1968, the court of appeals issued a formal decree denying the petition for review (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). In our view, however, the petition is out of time under 28 U.S.C. 2101(c).

The March 5 judgment constituted a full, effective and formal determination of the proceedings in the court below. The Board order consisted simply of the dismissal of a complaint and contained no affirmative provisions to be enforced. Denial of the petition to review this order, therefore, formally effectuated in the March 5 judgment, left no further occasion for any exercise of discretion by the court below, and the subsequent decree entered by the court was superfluous. The April 16 decree thus did no more than to restate what had been ordered by the March 5 judgment.[1] Since the petition was filed more than 90 days after entry of the March 5 judgment, which was for all relevant purposes "final," the petition is untimely.[2]

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[1] See *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379; *United States* v. *Adams*, 383 U.S. 39, 41-42.

[2] Seventh Circuit Rule 14(*l*), like new Rule 19, Fed. R. App. P. (effective July 1, 1968), contemplates deferred filing of an operative final judgment or decree only where the court of appeals is *enforcing* an agency order, in whole or in part, so that formulation of an appropriate injunctive decree can take place. There is no corresponding recognition of a hiatus when the reviewing court has, as here, merely denied, categorically, a petition for review.

Federal Trade Commission v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-212. See, also, Stern & Gressman, *Supreme Court Practice* (3d ed., 1962) p. 203, n. 7.

Even if the petition did properly invoke this Court's jurisdiction, there would in any event be no occasion for further review, as we shall briefly discuss.

QUESTION PRESENTED

Whether a labor union restrains or coerces employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A) of the Act, by fining its members for violating restrictions upon incentive earnings which had been adopted by the union and acquiesced in by the employer.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 2-3.

STATEMENT

1. The relevant facts are not in dispute. For many years the Union[3] has been the bargaining representative of the production employees of Wisconsin Motor Corporation ("the Company"). The employees, pursuant to the collective bargaining agreement, are required either to join the Union and maintain good

[3] Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO.

standing, or to decline membership and pay a service fee to the Union (Pet. App. 14a). About half of the Company's 850 production employees are compensated on a piecework, or "incentive" basis, whereby they may earn amounts in excess of their basic hourly wages by producing at a rate in excess of established norms of hourly output (Pet. App. 15a).

All incentive work is classified, under the bargaining contract, into five different grades according to the skills involved. For each grade, the contract guarantees a minimum hourly rate called the "machine rate," which is periodically established by agreement between the Company and the Union (R.A. 14-17, 33, 45.)[4] Incorporated in the machine rate are allowances for such factors as setting up the job for production, picking up and loading, cleaning of tools, and the personal needs and fatigue of the worker himself (R.A. 15-16, 24-26). By minimizing the allowances mentioned and producing at a rate in excess of the "machine rate," an employee on incentive pay can increase his earnings, since the Company will compensate him for such excess production at a somewhat higher hourly rate (R.A. 6-7, 16-17, 45).

When such employees are absent from work, or their machines are required to be inoperative, or production activity is stopped, the bargaining contract provides that they are to be compensated either at the machine rate, or at a lower rate (called the "day rate"), depending upon the circumstances (R.A. 17, 18, 21-22, 47).

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[4] "R.A." refers to respondent's appendix in the court below.

The Union, whose membership is limited to employees of the Company, has for many years discouraged its members from fully exploiting the opportunities for increased wages inherent in the Company's compensation scheme (R.A. 2-3, 10, 14, 46). To this end, "ceiling rates" have been established and members have been required not to charge the Company for any production which would yield an hourly earning rate in excess of this ceiling. The Union's rule, in its current form, provides:

> A. The basic objective of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a Union Member.
>
> B. Any member violating these ceilings, shall be subject to a fine of One Dollar ($1.00) for each violation. The violators shall be processed by not less than 3, nor more than 5 members of the Executive Board.
>
> In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member. [R.A. 34, 46].[5]

Members do not violate the Union's ceilings by excessive production; the Union's rules do not seek to

[5] Article 30 of the Union's International Constitution establishes the penalties for "conduct unbecoming a member of the Union" as suspension and/or fines from $1.00 to $100.00; expulsion from membership may follow nonpayment of fines (R.A. 35).

retard the flow of production but only to limit the amount of current earnings which members may receive from the Company (R.A. 5-8, 9, 17, 47-48). Instead of reporting excess production to the Company for immediate compensation, members are required to "bank" their earnings in excess of ceiling, and hold them in reserve for occasions when they earn less than ceiling (R.A. 5-8). For example, when an employee is absent or is unable to produce because his machine is not operating, the bargaining contract provides that the Company will compensate the employee at either the machine rate, or the lower day rate, depending on the specific reasons for nonproduction. At these times, the Union permits its members to draw upon their "bank," *i.e.*, to collect for work previously produced but not reported for wage purposes.

The Company, however, has not bound itself in the bargaining contract to require employees to follow the banking process, and does not do so.[6] If an employee

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[6] The Union's banking system has been a frequent subject of bargaining. Over the years, the Company has on various occasions begun negotiations with a request that the Union eliminate its ceiling rate, but no agreement on this point has been reached. More frequently, the Company's bargaining position has included a proposal for the increase of ceiling rates and, as an inducement therefor, a raise in basic wage rates (R.A. 4-5, 8-10, 32-33, 51).

In addition, the negotiated ceiling rate plays an integral role in the Company's wage structure, since the parties determine the rate of compensation for production in excess of the machine rate by reference to the ratio between the machine rate and the ceiling rate (R.A. 11-12, 52).

reports all production for immediate payment, the Company will make full payment even if this will exceed the Union's ceilings (R.A. 5-7, 48; R.A. 4). But if the employee follows the Union's rule, the Company will honor his choice by permitting him to bank excess production for later payment (provided that all banks be depleted by annual inventory time (R.A. 17, 48)), and by paying him for this production during subsequent non-productive periods (R.A. 9, 18; Pet. App. 15a).[7] Such a delayed production payment is a full substitute for, and is not in addition to, the machine rate or day rate payment which the Company would otherwise be bound to pay (R.A. 17, 18, 55).

Although Company representatives testified that they were opposed to the Union's banking system and preferred to let employees "earn as much as they can" (R.A. 53), they did acknowledge certain management advantages in the system.[8]

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[7] In addition to permitting such a deferred payment system, the Company has also honored the banking system by supplying the Union with the employees' work cards to permit checking for individual compliance with the system (R.A. 3, 9, 48, 51).

[8] For example, Plant Superintendent Bohmann explained that there was a financial saving to the Company when an employee draws against his bank for compensation during a "down time" instead of receiving his machine rate (R.A. 17-18, 55). He also acknowledged that the Company's production performance in this industry of high skill and precision was characterized by a low scrap rate which might well be jeopardized if employees became excessively pre-occupied with sheer quantity of production (R.A. 18-19, 54-55). Moreover, the Company has paid dividends without interruption

The Company witnesses also complained that the banking system has resulted in periods of voluntary worker idleness, especially before a vacation period or annual inventory time (R.A. 23-24, 53). On cross-examination, however, these witnesses conceded that the Company had recently promulgated orders curbing unnecessary idleness, and that these rules were effective in resolving the problem (R.A. 26). In addition, of course, the Company retains power to discipline or discharge employees who fail to produce a sufficient quantity to meet the machine rate level and the Company has not complained that this machine rate is set so as to sanction inadequate production for the wages paid (R.A. 15-16, 27-28, 56).

2. In February 1961, the Union conducted its semi-annual examination of employee work cards (see note 7, *supra*, p. 7), and found that six members had violated the banking system by reporting to the Company, for immediate payment, production at a rate in excess of the Union ceilings (R.A. 29-30, 37-38). The Union served written charges upon each of the six members and notified them of their impending trial.[8] As a result of the trials, all six members were fined in amounts ranging from thirty-five to one hundred

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every year since 1946, when the Union first began enforcing its banking system (R.A. 55-56), and the average hourly earnings of the Company's incentive employees—despite the impact of the Union's ceilings—exceed that of employees in comparable local establishments (R.A. 13-14, 21, 54-56).

[8] The members were permitted to have counsel, and there is no contention that the Union disciplinary machinery failed to comport with the requirements of fair procedure.

dollars. Two members subsequently paid their fines; the four petitioners refused, and filed unfair labor practice charges instead. On October 2, 1961, the Union filed suit in a Wisconsin State court to collect the amounts assessed, and that lawsuit is still pending (R.A. 37-38; Pet. App. 17a). No action has been taken or threatened by the Union that would impair petitioners' employment status. (Pet. App. 17a).

Upon the above facts, the Board concluded that the Union had not violated Section 8(b)(1)(A) and dismissed the complaint. Agreeing with the Trial Examiner, the Board held that Congress did not intend by that Section to prohibit the type of union program here involved (Pet. App. 6a).

The court of appeals sustained the Board's findings and conclusions and denied the petition for review (Pet. App. 3a-12a).

ARGUMENT

The decision of the court of appeals is correct, accords with recent decisions of this Court, and does not conflict with the decision of any other circuit. Thus, even apart from the untimeliness of the petition, further review would not be warranted.

1. This Court has recently established two major "guideposts" (Pet. 11) for ascertaining the relationship between Section 8(b)(1)(A) and union discipline. In *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, the Court held that that Section does not prohibit a union from fining members who cross an authorized picket line in order

to work during a strike; and in *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers,* No. 796, 1967 Term, decided May 27, 1968, the Court ruled that that Section prohibits union discipline of a member for filing charges with the Board in violation of a union policy requiring prior exhaustion of union remedies. The Court itself harmonized these results—as had the Board, whose decisions were upheld in both cases—by referring to the legitimacy of the union policy sought to be enforced:

> Thus, § 8(b) (1) (A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play, * * * [particularly] the overriding public interests * * * [in] unimpeded access to the Board * * *. [*Industrial Union, supra,* slip op. pp. 5-6.]

In this case, the court of appeals properly concluded that the *Allis-Chalmers* guidepost more appopriately applies to the situation at bar (Pet. App. 6a) because the union fines here involved were reasonably aimed at achieving "a legitimate union objective" (Pet. App. 10a). The court below distinguished the type of discipline involved in *Industrial Union* on the ground, shortly thereafter adopted by this Court in that case, that the union rule there offended strong policy considerations not at stake here (Pet. App. 12a). The undisputed facts of the present case demonstrate the soundness of the decision below.

The union rule in this case limits the amount of incentive pay a member may earn but does *not* limit his productivity. As the Board—whose factual determinations were approved by the court of appeals—explained (Pet. App. 15a):

> The Union does not require that the member cease production when he has attained the ceiling rate for the day; he may continue working, but, in order to comply with the rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payment. An employee may draw on his "bank" * * * for example, when he is sick and unable to work, or his machine is out of order. * * *

Although the Union's interest in protecting its members against the abuses of incentive pay systems (see R.A. 107-108) may not be as critical as its interest in preserving solidarity during a strike, the problem of productivity levels is nonetheless one of legitimate and historical union concern (Pet. App. 8a-10a). The union rule in this case is, as it declares on its face, designed "to protect members of the Union in their employment and to give them as much security as the industry can provide" (R.A. 34; p. 5, *supra*). Moreover, the rule was carefully tailored so as to minimize the impact on the employee's legitimate interests. As the court below noted (Pet. App. 10a-11a), this rule is less severe in its economic impact on members than the rule held enforceable by this Court in *Allis-Chalmers*. As we have seen, petitioners were

not precluded from producing in excess of quota; this rule merely restricted their opportunity to demand immediate compensation for the excess work, requiring them instead to bank it for a "rainy day."

Moreover, although the Company does not consider itself bound by the rule, it has, as the Board found (Pet. App. 16a), nevertheless "accepted the ceilings as an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure." (See, also, note 6, *supra*, p. 6). Thus, as the Board added (Pet. App. 16a), "the Company has never sought to discipline any of the employees for adherence to the Union's ceiling restrictions"; the Company "uses the ceilings in computing wages and evaluating jobs"; ceilings have also played a "role in the negotiation of collective-bargaining agreements between the Company and the Union"; and "the Company voluntarily aids and cooperates with the Union in the administration of the rule" by making the necessary bookkeeping entries for the "banking" procedures, permitting the ceilings to be posted on its bulletin boards, and permitting Union stewards to inspect the employees' production records on company time and without loss of pay.

In these circumstances, here, no less than in *Allis-Chalmers*, it was within the competence of the Union to decide that the interests of its members were best served by a deferred compensation rule, and to require employees who elected to become members of the Union to adhere to that rule. Similarly, here, no less than in *Allis-Chalmers*, the Union could, without running afoul of Section 8(b)(1)(A), impose reasonable

discipline on members violating that rule. Since the fines imposed were no greater than those involved in *Allis-Chalmers*, and since no attempt was made to affect the members' job rights, the discipline here did not exceed permissible limits.

Petitioners' contention (Pet. 6-9) that this case involves a union rule which derogates from the collective bargaining process as contemplated by the Act, and therefore violates public policy in a manner akin to the rule involved in *Industrial Union*, is wide of the mark. The Union's rule here does not restrict production as such; in view of the Company's traditional acquiescence in its operation, the Board and the court of appeals properly refused to equate the rule with slowdowns and other interferences with established employer production norms which might be regarded as a unilateral effort to establish terms and conditions of employment (Pet. App 12a).[10]

[10] Thus, *Associated Home Builders* v. *National Labor Relations Board*, 352 F. 2d 745 (C.A. 9), is quite distinguishable. There the court, while reserving the question whether Section 8(b)(1)(A) was violated, suggested that the union had violated its bargaining duty by fining members to enforce a production ceiling which had been unilaterally established by the union and was directly *contrary* to the provisions of the negotiated bargaining agreement (352 F. 2d at 751).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board.

AUGUST 1968.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, March 5, 1968

BEFORE

HON. WIN G. KNOCH, Senior Circuit Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEPANEC and GEORGE KOZBIEL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the Natioinal Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court filed this day; and

upon presentation, an appropriate decree will be entered.

A True Copy:

Teste:

/s/ Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals
for the Seventh Circuit

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